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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM ALSUP, JUDGE,

ORACLE AMERICA, INC.,)
)
PLAINTIFF,)
)
VS.) NO. C 10-3561 WHA
)
GOGGLE INC.,)
DEFENDANT.) THURSDAY
) AUGUST 23, 2012
) 8:20 O'CLOCK A.M.

TRANSCRIPT OF PROCEEDINGS**APPEARANCES:****FOR PLAINTIFF:**

MORRISON & FOERSTER LLP
755 PAGE MILL ROAD
PALO ALTO, CALIFORNIA 94304-1018
BY: MICHAEL A. JACOBS, ESQUIRE
KENNETH A. KUWAYTI, ESQUIRE
ROMAN A. SWOOPES, ESQUIRE
DANIEL MUINO, ESQUIRE

AND

ANDREW C. TEMKIN, CORPORATE COUNSEL
ORACLE
500 ORACLE PARKWAY M/S 50P7
REDWOOD SHORES, CALIFORNIA 94065

FURTHER APPEARANCES ON NEXT PAGE

REPORTED BY: KATHERINE WYATT, CSR 9866, RMR, RPR

OFFICIAL REPORTER - US DISTRICT COURT
COMPUTERIZED TRANSCRIPTION BY ECLIPSE

1 **FURTHER APPEARANCES:**

2 **FOR THE DEFENDANT:**

3 **KECKER & VAN NEST LLP**

4 633 BATTERY STREET

5 SAN FRANCISCO, CALIFORNIA 94111-1809

6 **BY: ROBERT A. VAN NEST, ESQUIRE**

7 **MICHAEL S. KWUN, ESQUIRE**

8 **REID P. MULLEN, ESQUIRE**

9 **CHRISTA MARTINE ANDERSON, ATTORNEY AT LAW**

10
11 **RENNY HWANG, ESQUIRE**

12 GOOGLE INC.

13 1600 AMPHITHEATRE PARKWAY

14 MOUNTAINVIEW PARKWAY, CALIFORNIA 94043

1 **AUGUST 23, 2012**

8:20 O'CLOCK A.M.

2
3 **P R O C E E D I N G S**

4 **THE COURT:** LET'S GO TO ORACLE V. GOGGLE.

5 **MR. JACOBS:** GOOD MORNING, YOUR HONOR. MICHAEL
6 JACOBS FROM MORRISON & FOERSTER FOR ORACLE.

7 WITH ME IS KEN KUWAYTI, DAN MUINO, ROMAN A. SWOOPES, AND
8 ANDREW TEMKIN FROM ORACLE.

9 **THE COURT:** WELCOME.

10 **MR. VAN NEST:** GOOD MORNING, YOUR HONOR. BOB VAN
11 NEST, KEKER & VAN NEST FOR GOGGLE. I'M HERE WITH MS. ANDERSON,
12 MR. KWUN, MR. MULLEN AND WITH RENNY HWANG FROM GOGGLE?

13 **THE COURT:** WELCOME BACK. THIS IS A MOTION FOR
14 JUDGMENT AS A MATTER OF LAW BROUGHT BY GOGGLE.

15 WHO IS GOING TO ARGUE THIS?

16 **MR. VAN NEST:** GOOD MORNING, YOUR HONOR. VERY
17 BRIEFLY, THIS MOTION CONCERNS THE NINE LINES OF CODE THAT WAS
18 DISCUSSED EXTENSIVELY DURING THE TRIAL. IT ADDRESSES QUESTION
19 3A ON THE VERDICT FORM.

20 YOUR HONOR INSTRUCTED THE JURY THAT THEY COULD CONSIDER
21 THE WORK AS A WHOLE TO BE THE TIMSORT FILE IN WHICH THE
22 RANGECHECK METHOD WAS FOUND. AND WE ARGUED BOTH IN CONNECTION
23 WITH OUR EARLIER MOTION AND WITH JURY INSTRUCTIONS AND WITH THE
24 VERDICT FORM THAT THAT WAS NOT CORRECT. THAT WORK AS A WHOLE
25 WAS THE ENTIRE J2SE PLATFORM, BE IT 1.4 OR 5.0.

1 WE ARGUED SECONDLY THAT THE RANGE CHECK METHOD WAS DE
2 MINIMUS AS A MATTER OF LAW IN THAT IT WAS ONLY NINE LINES OF
3 CODE. WHETHER YOU VIEW THAT AS NINE OUT OF 3,000, WHICH WAS THE
4 TIMSORT FILE, OR YOU VIEW IT AS NINE OUT OF SEVERAL MILLION,
5 WHICH WAS THE J2SE PLATFORM, IT'S DE MINIMIS AS A MATTER OF
6 LAW.

7 AND I THINK YOUR HONOR NOTED IN DISCUSSING THE DAMAGES
8 FEATURES OF THIS THAT THIS WAS CODE THAT ANYONE COULD WRITE, A
9 HIGH SCHOOL PROGRAMMER COULD WRITE. IT COULD BE WRITTEN IN A
10 SHORT PERIOD OF TIME.

11 WE HAVE ARGUED THIS TWICE. YOUR HONOR HAS RULED FOR ORACLE
12 BOTH TIMES. I HONESTLY DON'T THINK THERE'S ANYTHING NEW IN THE
13 BRIEFS THAT WE DIDN'T PRESENT BEFORE, SO I WOULD SUBMIT IT ON
14 THE PAPERS, AND OUR PRIOR ARGUMENTS AND DISCUSSION WITH YOUR
15 HONOR.

16 **THE COURT:** THANK YOU FOR YOUR BREVITY.

17 ORACLE.

18 **MR. JACOBS:** MR. KUWAYTI WILL ARGUE THIS YOUR HONOR.

19 **THE COURT:** MR. KUWAYTI.

20 **MR. KUWAYTI:** GOOD MORNING, YOUR HONOR.

21 **THE COURT:** GOOD MORNING.

22 **MR. KUWAYTI:** I THINK I HAVE NO CHOICE BUT TO BE AS
23 BRIEF AS GOOGLE'S COUNSEL GIVEN YOUR COMMENTS. I THINK THIS IS
24 AN ARGUMENT THAT YOUR HONOR HAS CONSIDERED BEFORE. THE PRIMARY
25 ARGUMENT GOOGLE MAKES IS THAT BECAUSE THE WORK WAS REGISTERED,

1 THE PLATFORM J2SE 5.0 AND THE PRIOR VERSION WAS REGISTERED WITH
2 THE COPYRIGHT OFFICE, THAT THAT HAS TO BE THE WORK FOR THE
3 PURPOSES OF DETERMINING THE WORK AS A WHOLE. THE COPYRIGHT
4 REGULATIONS DON'T SAY THAT.

5 TO THE CONTRARY, THEY SAY THAT YOU CAN REGISTER. YOU HAVE
6 COPYRIGHTABLE ELEMENTS THAT THEMSELVES CONSTITUTE
7 SELF-CONTAINED WORKS. THEY CAN BE REGISTERED AS A SINGLE WORK
8 WHEN THEY ARE COMBINED IN ONE UNIT OF PUBLICATION. THAT'S WHAT
9 HAPPENED HERE.

10 I THINK ANYTHING TO THE CONTRARY WOULD BE AN
11 ADMINISTRATIVE NIGHTMARE. IT WOULD REQUIRE CLAIMANTS TO
12 REGISTER EVERY SINGLE FILE OF COMPUTER CODE THAT THEY ARE
13 SUBMITTING WITH THEIR PROGRAM.

14 THE COPYRIGHT OFFICE DOESN'T WANT THAT, DOESN'T REQUIRE
15 THAT. AND I THINK THE CASE LAW THAT WE'VE CITED, PARTICULARLY
16 THE HUSTLER CASE, BEARS THAT OUT.

17 I THINK THE OTHER ISSUE HERE IS THAT IF THERE WERE A RULE
18 TO THE CONTRARY THAT WOULD MEAN THAT A PLAGIARIST COULD SIMPLY
19 COPY FILES AT WILL OUT OF A COMPUTER PROGRAM THAT'S VERY LONG,
20 AND THEN MAKE THE ARGUMENT THAT:

21 "THERE'S 15 MILLION LINES OF CODE, OR 2 MILLION LINES
22 OF CODE, AND WE ONLY COPIED NINE FILES," AS IS THE CASE
23 HERE.

24 THE NEWTON VERSUS DIAMOND CASE WHICH BOTH PARTIES HAVE
25 CITED TALKS ABOUT THE POLICY BEHIND THE DE MINIMIS RULE BEING

1 THAT COPYRIGHT INFRINGEMENT SHOULD ONLY BE INFRINGEMENT IF
2 THERE'S COPYING TO AN UNFAIR EXTENT.

3 THIS MOTION WAS ADDRESSED NOT JUST TO RANGECHECK, BUT TO
4 THE EIGHT DECOMPILED FILES.

5 I SUBMIT TO YOUR HONOR THAT A RULE THAT SAYS INTENTIONALLY
6 DECOMPILING FILES AND COPYING THEM IS NOT COPYRIGHT
7 INFRINGEMENT IN THE FIRST INSTANCE IS THE WRONG RULE. IT MAY BE
8 THAT THERE ARE VERY LITTLE DAMAGES ASSOCIATED WITH THAT
9 INFRINGEMENT. IT MAY BE THAT IT'S USED IN A CONTEXT THAT
10 JUSTIFIES A FINDING OF FAIR USE. AND THERE'S NO SUCH CLAIM
11 HERE. BUT TO HOLD THAT SOMEBODY CAN SIMPLY DO THAT, AND THAT
12 IT'S NOT EVEN COPYRIGHT INFRINGEMENT AT ALL I THINK IS THE
13 WRONG ARGUMENT.

14 AND THE LAST THING THAT I'D SAY IS THAT WHETHER THE COURT
15 APPLIES WHAT WE THINK IS THE PROPER LENS, WHAT YOUR HONOR HAS
16 HELD IS THE PROPER LENS OF COMPARING IT TO THE INDIVIDUAL FILE,
17 OR THAT YOU COMPARE IT TO THE LINES OF CODE AS A WHOLE, THE
18 STANDARD IS IT IS ONLY DE MINIMIS IF IT'S -- IF THE USE IS SO
19 MEAGER, THE COPYING SO IS MEAGER AND FRAGMENTARY THAT AN
20 AUDIENCE WOULDN'T RECOGNIZE THE COPYING.

21 IN THIS CASE IN EITHER INSTANCE THE AUDIENCE, WHICH THE
22 PARTIES AGREE IS PROGRAMMERS, PEOPLE WHO CAN READ THE CODE,
23 WOULD RECOGNIZE THAT COPYING TOOK PLACE.

24 AND THERE IS AMPLE EVIDENCE IN THE RECORD WITH RESPECT TO
25 RANGECHECK AND WITH RESPECT TO THE EIGHT DECOMPILED FILES TO

1 SUPPORT THE JURY'S FINDING ON RANGE CHECK AND TO SUPPORT THE
2 JUDGE'S -- YOUR RULING ON JMOL.

3 **THE COURT:** ALL RIGHT. THANK YOU.

4 **MR. KUWAYTI:** THANK YOU.

5 **THE COURT:** SUBMITTED?

6 **MR. VAN NEST:** YES, YOUR HONOR.

7 **THE COURT:** OKAY. IS THAT ALL THAT WE HAVE TODAY?

8 **MR. VAN NEST:** I BELIEVE SO.

9 **THE COURT:** ALL RIGHT. THANK YOU VERY MUCH. IT'S
10 UNDER SUBMISSION.

11 **MR. JACOBS:** THANK YOU, YOUR HONOR.

12 (THEREUPON, THIS HEARING WAS CONCLUDED.)

13 STENOGRAPHY CERTIFICATION

14 "I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
15 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER."

KATHERINE WYATT

16 10-19-12
17 KATHERINE WYATT

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